into the Test Environment. First, Bell Atlantic had to load into the Test Environment, four weeks prior to a CLEC impacting release, "production ready code". The code to be loaded had to have passed "through Quality Assurance testing by Bell Atlantic and be ready for production. After completion of CLEC testing the code will be migrated into production".[26]

(b) Release Testing: The Release states that Bell Atlantic "has created and will maintain a standard Quality Baseline Validation Test Deck of pre-order and order transactions that will be used to test a new release".[27] Bell Atlantic also committed itself to "develop specific test scenarios for the functionality of the new release."[28]

(c) Release Testing Process: Testing of new releases "will begin four weeks prior to implementation of the release".[29] Bell Atlantic commits not to "make any changes to the CLEC Test Environment while CLECs are testing the release". Specific times are provided for the fixing of defects during the CLEC testing period.[30]

The Release also provides in Attachment B "the escalation procedure to be used if necessary to resolve issues during CLEC new release testing".[31]

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26. Ibid.

27. Release, p. 2

28. Ibid.

29. Id. at p. 3

30. Id. at p. 4

31. Ibid. The remaining portions of the Release do not bear significantly on the matters (continued...)

## B. The Remedies Sought

The Complainants seeks two types of remedies. First a monetary penalty of $50,000 per day for the 28 business days from March 1 through April 7, 2000.[32] They assert that such a penalty is fair, that it would only partially compensate them for their added out-of-pocket expenses caused by the delay, and, perhaps most important, that the delay has prevented their competing effectively with Bell Atlantic.

In addition, Complainants seek injunctive relief and request that the Tribunal enter an order setting a specific schedule for future CLEC testing and providing for "explicit self-executing monetary penalties".[33] Bell Atlantic's Motion to Dismiss is addressed to this injunctive relief.

# V. The Award

This Award is of seminal importance. It is, as far as the Tribunal is aware, the first time that the series of events that began with the Bell Atlantic-NYEX Merger and continue today and were to culminate in the CLEC's having the capacity to compete with Bell Atlantic in its market for local telephone service, has been subject to an overall review and analysis. The Tribunal has undertaken in this Award that task insofar as such a review and analysis are relevant to the issues now before it.

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31. (...continued)
now before the Arbitral Tribunal and will not be discussed.

32. Complainants' Post Hearing Brief, p. 53.

33. Complainants' Post Hearing Brief, p. 37.

Those issues are basically these: First, AT&T and MCI assert that Bell Atlantic has failed to fulfill its obligations to them under the Settlement Agreement in that it failed to make "the February Release of LSOG4 available on a timely basis". They seek monetary and injunctive relief.

The second issue is raised by Bell Atlantic in its Motion to Dismiss. The gravamen of that Motion is that the injunctive relief sought by the Claimant exceeds the Tribunal's authority under the Settlement Agreement and the applicable CPR Rules.

**A. The Tribunal's Construction of the Settlement Agreement**

The first task of the Tribunal is to consider the conflicting positions of the Parties with respect to the proper construction of the Settlement Agreement. They take diametrically opposed positions. On the one hand, AT&T and MCI argue that, with respect to the February 2000 LSOG4 release, Bell Atlantic had fixed deadlines that it did not meet and that it failed to use the only procedure permitted by the Settlement Agreement -- Section 6.5 -- to seek to establish new deadlines. On the other hand, Bell Atlantic argues that there were no fixed deadlines and that its only obligation under the Settlement Agreement was to use its best efforts to meet the dates fixed by the Settlement Agreement, that it did in fact use its best efforts and, consequently, that it is not in violation of the Settlement Agreement.

Earlier in this Award,[34] the Tribunal gave a general overview of the Settlement Agreement. It now turns to the task of construing that Agreement.

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34. See pp. 20-28 supra.

### 1. Does the Settlement Agreement mandate fixed deadlines or best-effort objectives?

The Settlement Agreement contains in Section 14.4 a warranty by each Party that "it is represented by competent counsel with respect to this Agreement and all matters covered by it". Moreover, it is common ground that the Agreement "is a carefully well-drafted document".[35]

The Agreement contains in a variety of contexts many time commitments. These time commitments are generally stated either in terms of "Bell Atlantic will use best efforts" to do certain things by a specified date[36] or in terms of the Party having the commitment "will" or "shall implement" that commitment by a specified date[37]. In section 6, which is the critical section in the instant arbitration, both formulae are used. The expression "best efforts" appears three times in Section 6. Its first appearance is in fn. 4 in Section 6.2. Here it is stated:

> *. . .Bell Atlantic further warrants that it will use best efforts to minimize such non-uniformity in the July 1, 2000 release for pre-ordering and ordering. . . .*

Note that the "best efforts" requirement stated here is directed not to a time limit but rather to an obligation to reduce non-uniformity. The "best efforts" formula is used in Section 6.4.2 to apply to the date December 1, 2001. However, Bell Atlantic's failure to

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35. March 12 Transcript, p. 34; Complainants' Post Hearing Brief, p. 28.

36. See Section 3.3

37. This is the formula generally used in Section 6.

meet this date "should not be considered a breach of Section 6 and will not be subject to the remedies set forth in Section 9".[38] Finally, "best efforts" is used in Section 6.5 where "[e]ach Party recognizes the importance of the dates [in Section 6] and [agrees to] use its best efforts to achieve them".

The other formula of "will" or "shall" implement a specified date appears seven times in Section 6.[39]

Section 6.5 states explicitly that "Bell Atlantic is committed to achieving the dates in Section 6". Moreover, only dates appearing in Section 6 are characterized as "deadlines"; no other dates in the Settlement Agreement are so characterized. See Settlement Agreement, Section 5, fn. 3 and Section 6.5. Webster's Ninth New Collegiate Dictionary defines "deadline" as "a date or time before which something must be done".

From the above analysis, a number of conclusions emerge. First, that some dates were viewed by the drafters as more critical than others -- those are the dates described as "deadlines". And, second, that the drafters knew how to distinguish between "best-effort" dates and "deadlines". It follows that "deadlines" set by the Settlement Agreement are strict requirements and must be met by the specified date.

Bell Atlantic, however, argues that Section 6.5 was intended to apply the "best-efforts" principle to all dates in Section 6. During the course of the legal argument on March 12, 2000, Counsel for Bell Atlantic stated:

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38. Section 6.4.2.

39. In Section 6.3 and 6.4.1 the expression "will make available" appears.

> *. . .the drafts men decided to include a single best efforts clause that would modify all of the dates in section 6, as opposed to putting individual best effort clauses which would apply only to Bell Atlantic in each section – in each part of section 6. . . .*[40]

Careful analysis of Section 6.5 leads to the rejection of this argument. First, the purpose of Section 6.5 is to provide an escape clause for Bell Atlantic. Towards that end, the second sentence of Section 6.5 contains an acknowledgment by each Party that it "recognizes the importance of the dates and will use its best efforts to achieve them". This is to assure the proper cooperation of all Parties in meeting the deadlines. If, notwithstanding such cooperation, Bell Atlantic can not meet a deadline, a process is provided through which Bell Atlantic may seek to secure an extension of the deadline. It did not seek any extension of the March 1, 2000 deadline.[41]

In respect to Bell Atlantic's position that Section 6.5 was intended to subject all the dates in that section to the "best-efforts" requirement, a few further observations may be made. It would have been most unusual and careless drafting to have used a separate escape provision to achieve a drafting objective that could have been achieved by the insertion of a sentence in the section or a few words modifying each date. Second, if the dates were intended to be "best-effort" dates, the escape clause would have been unnecessary and redundant. And, finally, it should be noted that the escape procedure

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40. March 12 Transcript, p. 38. In its Post-Hearing Brief, Bell Atlantic devotes pp. 20-26 to its interpretation of Section 6.

41. Bell Atlantic concedes that it did not invoke the procedures set forth in Section 6.5. See March 12 Transcript, p. 36.

does not adapt a "best-efforts" standard for the extension of a deadline. It provides that Bell Atlantic must demonstrate to "the satisfaction of the Arbitration Panel that it has acted in good faith and has used all reasonable efforts to meet the deadline".[42]

One comment on Bell Atlantic's discussion of Section 6 and the best-efforts issue in its Post-Hearing Brief is useful. In discussing the exchange between the Chairman and Mr. Vaughn at pages 56-58 of the March 12 transcript, the Brief states:

> *As explained above, AT&T/MCIW's theory that Section 6.5 solely concerns extensions fails because it provides no plausible explanation for the purpose of the first two sentences of that Section. At the hearing on this matter, however, one member of the Panel suggested that perhaps the 'best efforts' language in Section 6.5 represents 'an obligation separate from' the obligation to meet the other deadlines in Section 6. The Panelist then suggested that Section 6.5 means that in determining whether to provide certain remedies, 'the arbitration tribunal can take into account the fact that [Bell Atlantic has] not complied with section 6.5 . . . in determining whether or not [Bell Atlantic has] failed to meet the dates specified in section 6.' Under this interpretation, the 'best efforts' language does not protect Bell Atlantic on the question of whether it has breached the Agreement; instead, it represents a factor to be considered by this Panel in awarding remedies.*
>
> *This interpretation, however, conflicts with Section 9.1, which governs remedies. This section specifies that* ***'Subject to Section 6.5, if the Arbitration panel determines that Bell Atlantic has failed to meet the dates specified in Section 6, it shall determine whether to provide remedies. . .'*** *(emphasis added). This phrase means that Section 6.5 governs and limits the possibility of any remedies in Section 9.1. The language 'subject to' in Section 9.1 supports Bell Atlantic's position that Section 6.5 applies to the whole of Section 6 - not*

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42. Settlement Agreement, Section 6.5.

> *as an **additional obligation** - but as a standard of performance to be maintained throughout the term of the Agreement.*[43]

First, it should be noted that the quotation of Section 9.1 in the second paragraph set forth above omits important language following "whether to provide remedies". The omitted language reads: "of between $5,000 and $100,000 per business day or an appropriate cure period. . . ". Second, the natural meaning of the phrase "[s]ubject to Section 6.5" in a section on remedies is that, if the escape mechanism of Section 6.5 is successfully invoked by Bell Atlantic, it will not have violated the original deadline because, in the language of Section 6.5, the Tribunal will have established a "new deadline". It thus will replace a fixed date with another fixed date - not with a best-efforts date. Third, it should also be pointed out that the "subject to phrase" has another effect. If AT&T and MCI had failed to use their best efforts to achieve the fixed date set in Section 6, that fact would certainly be a mitigating factor that might reduce or eliminate a monetary award pursuant to Section 9.1.

Bell Atlantic's construction of the "subject to Section 6.5" provision of Section 9.1 does not support its case. Quite to the contrary, that provision supports the construction argued by AT&T and MCI that the Tribunal has found to be correct.

The Arbitral Tribunal has unanimously concluded that the dates fixed by Section 6 of the Settlement Agreement are "deadlines" and that they can only be altered through

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43. Bell Atlantic's Post-Hearing Brief, pp. 25-26. Footnotes omitted. Emphasis in original.

the procedure established by Section 6.5. Accordingly, the Tribunal finds that Bell Atlantic was bound under the Settlement Agreement to meet the March 1, 2000 deadlines provided in Section 6 of the Settlement Agreement.

### 2. Definitions of terms appearing in the Settlement Agreement, including the CLEC Test Release

The Settlement Agreement imposes two standards that must be met to determine whether the interfaces between the Complainants' and Bell Atlantic's operations support systems will be considered implemented. First, Section 7.2 requires that Bell Atlantic shall have conducted "successful region-wide integration testing of the pre-ordering, ordering and provisioning interfaces in accordance with" the CLEC Test Release. Second, Section 7.6 requires that Bell Atlantic shall have engaged "in carrier-to-carrier testing with AT&T and MCIWorldCom for each state or the District of Columbia where either requests such testing".

In order to apply these standards, the Tribunal has found it necessary to define certain terms:

(a) "production ready code" as used in the CLEC Test Release;

(b) "stable test environment"[44]; and

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44. The parties agree that the CLEC test environment must be "stable". Bell Atlantic contends that a "stable test environment is one that is not constantly undergoing change". Toothman, March 11 transcript, p. 57. AT&T and MCI contend that a "stable test environment" is one which has reached a point of development and testing such that it is ready to be used in the conduct of business. See Carmody, March 10 transcript, p. 182. See also AT&T Ex. X, KPMG Exception Report No. 5, which indicates that to be stable, a test environment must have achieved a commercial

(continued...)

(c) "successful region-wide integration testing" as used in Section 7.2.

On the basis of the record before it, the Tribunal finds that each of the above terms for purposes of compliance with the Settlement Agreement shall be defined as follows:

(a) "Production ready" means that the application software and supporting system and utility software, computer infrastructure, and telecommunications infrastructure have attained a quality level that makes the environment suitable for routine, high-volume use servicing real customer needs under normal operating conditions with normal levels of monitoring and technical support. To meet this standard, the following testing must be completed:

- The Base Line Validation Test Deck, the release specific test deck transactions established by Bell Atlantic, and the release specific test deck transactions proffered by the CLECs under Section 7.5 of the Settlement Agreement have been run in the CLEC Test Environment, with each test deck achieving a validation ratio of no less than 90 percent.

- Documentation is available to CLECs which meets commonly accepted professional standards for completeness, accuracy and ability of the reader to understand the material.

(b) "Stable test environment" means a test environment in which the degree and frequency of change in the application software and supporting system and utility software, computer infrastructure, and telecommunications infrastructure is sufficiently small that customers (i.e., CLECs) can use the environment for system-to-system testing, having confidence that the results they achieve will be reproducible. To meet this standard, the following benchmarks must be fulfilled:

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44. (...continued)
standard of success validation and not be subject to frequent changes.

- The software and hardware used in the test environment must be "production ready" as defined above.

- The test environment must be available for CLEC testing at least eight hours per day from Monday to Friday.[45] However, the last Wednesday of the test period is reserved to make changes that must occur before the release. The test environment will be available on the last Thursday before the release for CLECs to retest. The test environment will not be available the last Friday before release.

- Changes to the environment may normally be made only once per week: on Wednesday evening (the "normal change time"). No changes can be made during the time periods when CLECs are actively testing.

- Emergency changes can only be made on Saturday evenings (the "emergency change time"). All users of the test environment should be notified promptly when emergency changes occur.

(c) "Successful region-wide integration testing" means that the Base Line Validation Test Deck, the release specific test deck transactions established by Bell Atlantic, the release specific test deck transactions proffered by the CLECs under Section 7.5 of the Settlement Agreement, and the carrier-to-carrier test deck scenarios used by each testing CLEC during the four-week CLEC new release testing period (as described under the heading "New Release Testing Process" at page 3 of AT&T Exhibit A) have been run in the CLEC Test Environment, with each of these test decks (including the individual testing CLECs[46] carrier-to-carrier test decks) achieving a validation ratio of no less than 95 percent.

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45. Thus, if the system went down for two hours between 9 a.m. and 5 p.m., an additional two hours of testing time would have to be made available.

46. For purposes of this Award, "testing" CLECs are AT&T and MCI.

### 3. Did Bell Atlantic meet the March 1, 2000 deadline for implementing the LSOG4 release?

In order for Bell Atlantic to achieve implementation, it must demonstrate "successful region-wide integration testing" as defined at p. 38 supra.[47] Further, the results of carrier-to-carrier testing must be considered in deciding whether implementation has been achieved.[48] Hence, Bell Atlantic must satisfy both requirements to achieve implementation. The Tribunal has determined that, for such testing to be successful, the relevant test decks must be validated with a 95% success rate.

Exhibit JJ indicates that, as of March 7, 2000 (the last date for which the record provides information), the Bell Atlantic LSOG4 Test Deck had achieved an overall validation level of 79.1%. Hence, as of the conclusion of the evidentiary phase of the hearing, Bell Atlantic had not achieved successful region-wide integration testing. Specifically, Bell Atlantic had not yet validated its LSOG4 Test Deck at the 95% level.

In the hearing, Mr. Fawzi testified to the success of carrier-to-carrier testing in Pennsylvania. He stated that, on March 9, 22 of the 23 Pennsylvania scenarios had been validated (a success ratio greater than 95%).[49] Mr. Carmody testified to the success of the carrier-to-carrier test process in Massachusetts. He stated that, as of March 10, 2000,

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47. See also Settlement Agreement (Exhibit KK), Section 7.2

48. Id. at Section 7.6

49. March 10 Transcript, p. 218.

100% of the test scenarios had validated.[50] The Settlement Agreement, Section 7.6, requires that Bell Atlantic engage in carrier-to-carrier testing in each geography in which the CLECs request such testing. The Tribunal cannot determine from the record, however, whether AT&T or MCI requested carrier-to-carrier testing of LSOG4 in the other three geographies (New York, New Jersey and Maryland). Hence, the record does not support a conclusion as to whether or not, as of the conclusion of the taking of evidence on March 11, 2000, successful carrier-to-carrier testing had been demonstrated.

The Tribunal finds that, as of the close of the evidentiary phase of the hearing, the mandated CLEC Test Environment ("CTE") had not been available for CLEC testing for the required time period. One of the criteria for CTE availability is production readiness, which in turn requires that the LSOG4 Test Deck be validated with a 90% success rate for each of its components, which would arithmetically result in an overall success rate of 90% or more. As of the conclusion of the evidentiary phase of the hearing, a 90% overall validation success had not been achieved.

Based on these facts, the Tribunal finds that Bell Atlantic had not achieved implementation as of March 1, 2000 or as of the conclusion of the evidentiary phase of the hearing. Successful region-wide implementation testing, which is a requirement for implementation, had not been achieved. It is not clear from the record whether or not successful carrier-to-carrier testing had been achieved. However, this does not change the

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50. Id. at p. 235.

conclusion of the Tribunal, since successful carrier-to-carrier testing in itself is not sufficient to establish that implementation has been achieved.

4. **What relief should be granted?**

The Tribunal has unanimously concluded that a monetary penalty should be imposed on Bell Atlantic of $50,000 per business day for each such day between the period March 1-12, 2000, i.e. a total of $400,000. The Tribunal has concluded that the record before it contains no evidence indicating that the failure to implement LSOG4 continued beyond March 12. See p. 9, supra, footnote 16. It can not receive evidence in the Arbitration after the record is closed. Therefore, the monetary penalty must be based on the number of business days between March 1 and March 12, i.e. eight business days. This total is calculated on the daily amount of $50,000 that the Complainants urge is appropriate under the circumstances here. On the one hand, the Tribunal notes that such amount falls within the range of $5,000 to $100,000 per business day established by Section 9.1 of the Settlement Agreement; that the monetary penalty imposed will be the first such penalty that will have been imposed on Bell Atlantic with respect to non-performance by it of the obligation to provide uniform interfaces for MCI and AT&T to access its operations support systems, an obligation that originally was to mature November 14, 1998; and that the total penalty would appear to be modest in comparison with the costs, loss of potential revenue and competitive disadvantages that delay imposes upon MCI and AT&T. On the other hand, the Tribunal takes into account the possible misinterpretation by Bell Atlantic of its obligations; the very considerable efforts that it has

made in an attempt to meet those obligations; and that this is the first time at which Bell Atlantic's obligations have been subjected to binding determination by arbitration pursuant to the Settlement Agreement. On balance, therefore, the Arbitral Tribunal believe that a monetary award of $400,000 is appropriate in that it is not only large enough to call attention to the importance of compliance with the deadlines of the Settlement Agreement but also modest enough to take into account the mitigating factors present here.

The Tribunal has also unanimously concluded that it will dismiss without consideration of the merits Bell Atlantic's Motion to Dismiss Certain Requests for Relief Made by Complainants. The Tribunal follows this course because in rendering this Award the Tribunal has had to construe the Settlement Agreement and to define a variety of terms. This Award will promulgate that construction and those definitions and, as so promulgated, they will be the construction and definitions that the Parties must apply in their future performance of the Settlement Agreement. Having a definitive construction of the Settlement Agreement and having these terms defined will go a long way towards clarifying Bell Atlantic's obligations for the future. In these circumstances, the Tribunal in its discretion has not granted any of the relief sought by the Complainants to which Bell Atlantic objects. Hence, its Motion to Dismiss need not be addressed at this time.

5. **The terms of the Award**

On the basis of the discussion, analysis and findings set forth above, the Tribunal hereby unanimously makes the following findings and awards:

(a) Bell Atlantic is in violation of the Settlement Agreement in that it did not implement the February Release relating to LSOG4 on or before March 1, 2000.

(b) A monetary penalty of $400,000 is hereby imposed on Bell Atlantic with respect to the above violation. This amount equals $50,000 per day for the eight business days between March 1-12, inclusive.

(c) To assist the Parties in their future compliance with the Settlement Agreement, unless and until changed or modified by order of the Tribunal, the terms defined at pages 37-38 hereof shall have the meaning there set forth.

(d) All monetary penalties and payments, pursuant to Section 9.4 of the Settlement Agreement, shall be divided equally between the two Complainants, unless they shall agree upon a different division.

(e) Bell Atlantic's Motion to Dismiss is denied without prejudice.

New York, New York

April 26, 2000

John C. Klick
Co-arbitrator

Todd L. Hixon
Co-arbitrator

Robert B. von Mehren
Chairman

(a) Bell Atlantic is in violation of the Settlement Agreement in that it did not implement the February Release relating to LSOG4 on or before March 1, 2000.

(b) A monetary penalty of $400,000 is hereby imposed on Bell Atlantic with respect to the above violation. This amount equals $50,000 per day for the eight business days between March 1-12, inclusive.

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(d) All monetary penalties and payments, pursuant to Section 9.4 of the Settlement Agreement, shall be divided equally between the two Complainants, unless they shall agree upon a different division.

(e) Bell Atlantic's Motion to Dismiss is denied without prejudice.

New York, New York

April 26, 2000

John C. Klick
Co-arbitrator

Todd L. Hixon
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